

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY RHINEHARDT,

Defendant-Appellant.

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UNPUBLISHED

March 9, 1999

No. 203001

Macomb Circuit Court

LC No. 96-000093 FH

Before: Smolenski, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

A jury convicted defendant of two counts of carrying a concealed weapon, MCL 750.227; MSA 28.424, after police officers discovered him in possession of a pistol and a large knife. The trial court sentenced defendant to concurrent terms of 30 to 60 months' imprisonment. Defendant appeals his convictions as of right. We affirm.

Defendant first argues the police did not have sufficient grounds to make an investigative stop; therefore, the trial court should have suppressed the evidence discovered during the search and dismissed the charges. We disagree. This Court reviews the trial court's factual findings for clear error. *People v Yeoman*, 218 Mich App 406, 410; 554 NW2d 577 (1996). However, the question of whether the officers' suspicion was reasonable under the Fourth Amendment is a question of law that we review de novo. *People v Bloxson*, 205 Mich App 236, 245 (Holbrook Jr., P.J.), 249 (Fitzgerald, J., concurring in Judge Holbrook's opinion); 517 NW2d 563 (1994).

The validity of a police officer's investigative *Terry*<sup>1</sup> stop turns on whether, considering the totality of the circumstances, the police have a particularized suspicion, based on objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing. *People v Champion*, 452 Mich 92, 98-99; 549 NW2d 849 (1996); *People v Shabaz*, 424 Mich 42, 59; 378 NW2d 451 (1985); *People v Peebles*, 216 Mich App 661, 664-665; 550 NW2d 589 (1996). An officer who makes a valid investigative stop may perform a limited patdown search for weapons if the officer has reasonable suspicion that the individual stopped is armed and poses a danger to the officer. *Champion*, *supra* at 99.

In this case, Sergeant Gerlach and Corporal Reichenbach were on routine patrol in a high crime neighborhood during the early morning hours of December 19, 1995, when they noticed a car with its back-up lights on and an individual standing between 50 to 100 yards away from the car in a parking lot shared by a motel and an apartment complex. The individual was standing near the office of the apartment complex, which was closed. Upon circling around and entering the lot, the officers identified the vehicle as a taxi and watched as it disappeared farther into the complex. To the officers, it appeared that the individual moved deeper into the shadows upon their arrival. The officers decided to approach on foot and investigate. As they got nearer, Sergeant Gerlach recognized the individual as defendant, whom he had recently arrested for narcotics.

At the preliminary examination, Corporal Reichenbach testified that after he and Sergeant Gerlach exited their vehicle and approached defendant, he saw defendant move his hand toward his right jacket pocket. Corporal Reichenbach requested that defendant place his hands against the wall. When defendant refused to comply with the request, Corporal Reichenbach placed him against the wall and conducted a patdown search, discovering a gun in defendant's right jacket pocket.<sup>2</sup> We find that at that point, the circumstances provided a legitimate basis to conduct a *Terry* stop and patdown search of defendant.<sup>3</sup> Although it appears that Sergeant Gerlach started and interrupted a patdown search of defendant prior to that point, his search was brief and did not recover any evidence.<sup>4</sup> The trial court did not err in denying defendant's motion to suppress the gun and knife recovered during Corporal Reichenbach's search.

Next, defendant argues this Court should reverse his conviction of carrying a concealed weapon based on the knife. Defendant claims he was denied due process because the trial court granted the prosecution's motion to amend the complaint to add this charge after the proofs were taken at the preliminary examination; therefore, he never received a preliminary examination on this charge. We disagree.

The trial court properly granted the prosecution's motion to amend the complaint. The evidence presented at the preliminary examination supported binding defendant over for carrying the knife as well as the original charge of carrying a concealed weapon based on the gun. The amendment did not cause unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). The facts and circumstances surrounding both charges of carrying a concealed weapon were identical and we are unable to discern how defense counsel's strategy at the preliminary examination would have been different if defendant had initially been charged with both counts of carrying a concealed weapon.

Defendant also argues the trial court erred by not giving CJI2d 11.11, which instructs the jury that a person is not prohibited from carrying a concealed weapon in the person's home or on their own property. Defendant's argument is without merit. Although the trial court did not read CJI2d 11.11, the trial court did comply with defendant's request to read the relevant portion of the concealed weapon statute, including the residence exception. This instruction covered the substance of the omitted instruction. Accordingly, even if we were to find that the evidence supported the requested instruction, the trial court did not err in failing to give CJI2d 11.11. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

Defendant next argues he was denied the effective assistance of counsel at trial because counsel failed to interview the manager of the apartment complex prior to her testimony and because counsel failed to ask the police witnesses all of the questions defendant prepared. We disagree. In order to establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). We fail to see how the result of the proceeding would have been different if counsel had interviewed the manager of the apartment complex before trial. The manager's testimony was supposed to help establish defendant's theory that the residence exception to the concealed weapon statute applied to this case, but the manager testified that she had never seen defendant before. Defendant argues the manager's testimony essentially made it impossible for him to prove that the residence exception applied to this case. However, even if the manager had not testified, and defendant was able to prove he lived at the apartment complex, defendant still would not have been able to prove the residence exception because he was found in possession of the gun and knife outside of the apartment in a public area. *People v Morrow*, 210 Mich App 455, 461, 463; 534 NW2d 153 (1995), *aff'd* 453 Mich 903 (1996). Moreover, it is not clear how counsel's strict adherence to the questions defendant prepared for impeaching the officers would have changed the outcome of the case. It was not within the jury's province to revisit the legality of the search of defendant. Because defendant has failed to show the requisite prejudice, his claim of ineffective assistance of counsel must fail.

Finally, defendant argues this Court should reverse his convictions because he should have been allowed to represent himself at trial. We disagree. This Court reviews the trial court's denial of defendant's requests for an abuse of discretion. *People v Ahumada*, 222 Mich App 612, 617; 564 NW2d 188 (1997).

Defendant claims the trial court denied two separate requests that he be allowed to represent himself. The first request arose before opening statements when counsel indicated to the court that defendant was insisting that counsel ask specific questions and make specific arguments exactly as defendant directed. The trial court recognized defendant had a right to play an active role in his defense and told counsel that he should consider defendant's suggestions and comply with them to the extent they were not improper. Counsel suggested that defendant be allowed to represent himself with counsel acting in an advisory capacity. Although defendant indicated such an arrangement would be acceptable to him, we find this was not a knowing and unequivocal request by defendant to represent himself. *People v Adkins (After Remand)*, 452 Mich 702, 722; 551 NW2d 108 (1996). Defendant's second request to represent himself was made near the end of the prosecution's case when counsel refused to ask specific questions upon defendant's request. The trial court denied defendant's request, finding that if defendant were allowed to represent himself it would be too burdensome on the court. This was a proper reason for denying defendant's request. *Ahumada, supra* at 615. The trial court did not abuse its discretion in denying defendant's requests.

Affirmed.

/s/ Michael R. Smolenski  
/s/ Gary R. McDonald  
/s/ Martin M. Doctoroff

<sup>1</sup> *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

<sup>2</sup> The knife was recovered after Corporal Reichenbach continued his search after moving defendant to the hood of the patrol car.

<sup>3</sup> In our review of the record, we note that at one point Sergeant Gerlach testified that defendant matched the general description of a robbery suspect, but he did not testify that this influenced his decision to stop and investigate defendant. Moreover, the trial court did not rely on this testimony in reaching its decision that the search was valid, and neither party discusses this testimony on appeal. Accordingly, we do not consider this testimony in our decision.

<sup>4</sup> Corporal Reichenbach testified that Sergeant Gerlach “did like a real brief touch on the front pockets of [defendant’s] jacket” when they first approached defendant. Sergeant Gerlach interrupted his search to call for assistance in stopping the taxi that had initially directed his attention to the parking lot.